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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-105

CURTISS-WRIGHT CORPORATION, *Petitioner,*

v.

GENERAL ELECTRIC COMPANY, *Respondent.*

BRIEF IN OPPOSITION

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RULE:

Federal Rules of Civil Procedure

Rule 54(b) 1, 4, 5, 6, 8, 9, 10

MISCELLANEOUS:

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OPINIONS BELOW

The Opinion of the Court of Appeals (Pet. App. 17a) is reported at 597 F.2d 35. The Opinions of the District Court (Pet. App. 1a and 10a) are not reported.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Did the Court of Appeals correctly hold that under Rule 54(b), Federal Rules of Civil Procedure, a Judgment making final an Order adjudicating fewer than all claims between the parties was not properly entered where (1) the party in whose favor it ran (a) showed no specific hardship it would suffer if entry of final judgment awaited the end of litigation, (b)

faced substantial counterclaims, and (c) itself was primarily responsible for the consequence of which it complains because of its long delay in asserting claims; and (2) the sums at issue are in the public fisc rather than in the possession of the party against which recovery is sought?

COUNTERSTATEMENT OF THE CASE

This suit was instituted on April 30, 1976, by Petitioner Curtiss-Wright Corporation ("Curtiss-Wright") against Respondent General Electric Company ("GE"). The Complaint, brought originally in 16 Counts, essentially attempts to blame GE for losses allegedly suffered by Curtiss-Wright in manufacturing large components for the propulsion systems of nuclear-powered naval vessels. GE, a prime contractor of the United States Navy ("Navy"), awarded 21 subcontracts to Curtiss-Wright totaling approximately $215,000,000 from 1968 to 1972. Among the principal allegations of the Complaint are that Curtiss-Wright was induced to enter into this business through misrepresentations, specifically that, although Curtiss-Wright had signed 21 fixed-price contracts, GE had "represented" that Curtiss-Wright was capable of performing the work at a profit, and had guaranteed that Curtiss-Wright would make a profit; that there was a mutual mistake as to the difficulty of the work; and that GE had engaged in a conspiracy with the Navy to deprive Curtiss-Wright of awards of further business. Curtiss-Wright demanded, *inter alia,* that it be awarded damages as the result of "fraud," and that its fixed-price contracts be reformed into cost-plus contracts giving it a profit.

GE filed an Answer denying the salient allegations of the Complaint and presenting various defenses. It also filed a Counterclaim, alleging, *inter alia,* that Curtiss-Wright had misrepresented its capability to manufacture these components and had failed to perform the contracts competently, forcing GE to render Curtiss-Wright extraordinary assistance in order to bring Curtiss-Wright's performance up to standard and to avoid delays and losses and a possible default in delivery of these critical items.

As Curtiss-Wright completed delivery of the components under each contract, it submitted vouchers seeking the final payment under each contract. In seeking those amounts, however, Curtiss-Wright had to confront a contractual clause requiring that "Seller [Curtiss-Wright] . . . agree[s] as a condition precedent to final payment, that the Buyer [GE] and the Government . . . are released from all liabilities, obligations and claims arising under or by virtue of this order" (Pet. App. 3a). Curtiss-Wright offered a qualified release, purporting to reserve "only" the claims of more than $60,000,000 made in its Complaint. After receiving the views of the Navy that the release clause should not be waived,[1] GE declined to make final payment without an appropriate release.

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[1] The Navy stated (Ct. App. A. 120-121):

"The claims which Curtiss-Wright proposes be excepted from the claims release were filed years after the contracts were entered, and in many cases years after the occurrence of the events on which the claims are based. Curtiss-Wright was or should have been fully cognizant that this late identification of claims likely would result in withholding of final payment until the claims were resolved. Based on the above, it is clear that the existence of outstanding claims at the time when final payment otherwise would be due is the result of

Thereafter Curtiss-Wright amended its Complaint to seek the final payments. On cross-motions for partial summary judgment the District Court held that Curtiss-Wright was entitled to the final payments notwithstanding the release clause (Pet. App. 1a-9a). At the same time that Curtiss-Wright moved for partial summary judgment concerning the final payments, it also filed a motion, based on several grounds, to dismiss GE's Counterclaim. That motion was denied.

Curtiss-Wright then moved for a certification of the District Court's orders awarding it the final payments as final judgments under Rule 54(b). The District Court recognized that "[b]oth the plaintiff and the defendant appear to be financially sound. Therefore, plaintiff's financial condition is such that it would be able to await the payment of these sums, and defendant's economic status is such that defendant will be able to satisfy the judgment whenever final judgment is entered" (Pet. App. 12a). It nonetheless held that Rule 54(b) certification should issue, solely because (a) a large sum was involved and (b) the statutory interest rate of six percent to which Curtiss-Wright would be entitled under applicable New York law was below present market rates. In moving for entry of a Rule 54(b) certification, Curtiss-Wright had attempted no showing of specific adverse consequences upon itself flowing from a delay in payment, beyond the receipt of interest at the statutory rate rather than current mar-

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Curtiss-Wright's own actions, the consequences of which were or should have been known to Curtiss-Wright.

". . . Curtiss-Wright's present pursuit of claims against [G.E.] under its subcontracts requires, by the terms and conditions of the subcontracts, a withholding of monies until such time as an unqualified claims release is effected."

ket rates. There was no suggestion, for example, that cash flow problems or any other specific corporate problem would ensue. The record also established that GE did not possess the sums in dispute representing the final payments; rather under its contracts with the Navy, GE would be reimbursed only upon payment to Curtiss-Wright.

On GE's appeal, the Third Circuit reversed the entry of a Rule 54(b) certification, and therefore did not reach the merits of the release clause issue also raised by GE (Pet. App. 17a-22a). Following its earlier decision in *Allis-Chalmers Corp.* v. *Philadelphia Electric Co.*, 521 F.2d 360 (1975), the court held that "[i]n the absence of unusual or harsh circumstances"—such as ones "involving considerations of solvency, economic duress, etc."—and in the face of substantial counterclaims, a Rule 54(b) final judgment should not be entered. A timely petition for rehearing and a suggestion for rehearing *en banc* were denied.

REASONS FOR DENYING THE WRIT

The decision below is clearly correct; it is not in conflict with any decisions of this Court or of any other Circuit; and it turns on the particular circumstances of this case. No issues warranting review by this Court are presented.

1. Petitioner Curtiss-Wright implies criticism of the Third Circuit's holding that a Rule 54(b) certification making final an otherwise interlocutory order disposing of fewer than all the claims in the case should be entered only in the "infrequent harsh case" (Pet. 7-8). That phrase, however, is the language of the Advisory Committee on the Federal Rules of Civil Pro-

cedure in explaining the 1946 Amendment to Rule 54(b), and has been recognized universally as the governing standard. *E.g., Campbell* v. *Westmoreland Farm, Inc.,* 403 F.2d 939, 942 (2d Cir. 1968); *Panichella* v. *Pennsylvania R.R. Co.,* 252 F.2d 452, 455 (3d Cir. 1958), *cert. denied,* 361 U.S. 932 (1960); *Allis-Chalmers Corp.* v. *Philadelphia Electric Co.,* 521 F.2d 360 (3d Cir. 1975); *Huckeby* v. *Frozen Food Express,* 555 F.2d 542, 550 (5th Cir. 1977); *Columbia Broadcasting System* v. *Amana Refrigeration,* 271 F.2d 257, 259 (7th Cir. 1959), *cert. denied,* 362 U.S. 928 (1960). The standard conforms to the strong federal policy against piecemeal appeals. *See Arlinghaus* v. *Ritenour,* 543 F.2d 461, 464 (2d Cir. 1976); *cf. Coopers & Lybrand* v. *Livesay,* 437 U.S. 463, 471 (1978).

2. Curtiss-Wright notes that decisions of this Court recognize that district courts have discretion in deciding whether to issue Rule 54(b) certifications.[2] Curtiss-Wright's suggestion that any Court of Appeals disagreement with a particular certification "conflicts" with those decisions, is hopelessly strained. In recognizing such discretion this Court added that "[w]ith equally good reason, any abuse of that discretion remains reviewable by the Court of Appeals." *Sears, Roebuck & Co.* v. *Mackey,* 351 U.S. 427, 437 (1956).[3] The Third Circuit did not disagree with either of these general propositions. There is no need for this Court to review the particular application here of the "in-

[2] *Cold Metal Process Co.* v. *United Engineering & Foundry Co.,* 351 U.S. 445 (1956); *Sears, Roebuck & Co.* v. *Mackey,* 351 U.S. 427 (1956).

[3] Undisputedly a Court of Appeals is to review carefully, not accept blindly, the correctness of a district court's Rule 54(b) certification. *E.g., Arlinghaus* v. *Ritenour, supra.*

frequent harsh case" test; but in any event the Third Circuit's determination that the District Court's application was too lax on this record lacking any evidence of genuine harshness was clearly correct.

Among other considerations, Curtiss-Wright did not even attempt to identify any specific harm flowing from a delay in payment. Such a delay does not, in and of itself, constitute irreparable injury, even in far more onerous circumstances. *E.g., Sampson* v. *Murray,* 415 U.S. 61, 89-92, n.68 (1974). Both parties are substantial corporations, as the District Court found.[4] In this commercial case, Curtiss-Wright faces substantial counterclaims—which the District Court properly refused to dismiss—and it clearly is "undesirable" to require one party, GE, to pay over to Curtiss-Wright substantial sums at this time "only to be reimbursed if [GE] prevails on its as yet unadjudicated counter-

[4] Curtiss-Wright's inability to show any true hardship was graphically demonstrated, during the pertinent events in this suit, by its active engagement in a campaign to purchase control of an even larger firm, Kennecott Copper Corporation. *See generally Kennecott Copper Corp.* v. *Curtiss-Wright Corp.,* 584 F.2d 1195 (2d Cir. 1978). In the District Court in this action, Curtiss-Wright presented not an iota of evidence that the lack of the funds it seeks to recover here affected even slightly its pursuit of that major corporate effort, or of any other corporate activities.

Curtiss-Wright's implication that the mere involvement of a substantial sum suffices to support a Rule 54(b) certification is baseless; "[t]he formulation of an appealability rule that turns on the amount of the plaintiff's claim is plainly a legislative, not a judicial, function." *Coopers & Lybrand, supra,* 437 U.S. at 472. The test instead is one of exceptional harshness in light of the particularized situation of the party seeking certification. Denial of immediate receipt of a "large" sum may have little effect upon a substantial corporation like Curtiss-Wright, whereas denial of a relatively small sum may be extremely harmful to an individual plaintiff.

claim." *Allis-Chalmers, supra,* 521 F.2d at 366, *quoting with approval* 10 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2659, at 82 (1973).[5] That consideration is of special force here, where the United States would be obligated to reimburse out of public funds any payment by GE.

In addition, Curtiss-Wright's suit was based largely on events which occurred many years before it instituted the action in 1976—such as claims that misrepresentations made in 1968-69 induced it to enter into the contracts at issue. As the Navy noted in stating that the release clause should be enforced, if any "hardship" falls upon Curtiss-Wright through a delay in final payment, it stems from its own choice to defer raising and getting resolved the claims before final payment ordinarily would be due. Rule 54(b) was not adopted to excuse a large corporation from self-inflicted problems.[6]

To put it mildly, on the merits Curtiss-Wright's entitlement to the monies at issue, in the face of a contractual clause explicitly requiring a release as a con-

[5] Curtiss-Wright's demeaning of GE's Counterclaims is baseless. Not only was a motion to dismiss the Counterclaims denied, but they will be proved at trial. This is hardly the place to discuss the merits of this massive commercial case. However, it safely can be said that a corporation which brings a suit on contentions that, for example, it was "guaranteed" a profit under fixed-price contracts, or that it relied upon an alleged representation of the other party that it "would" make a profit in an endeavor expected to extend over many years and necessarily involving a multitude of factors affecting profitability, is a poor judge of merit.

[6] GE has raised the defenses of statute of limitations and laches to Curtiss-Wright's legal and equitable claims. These defenses have not yet been adjudicated.

dition precedent to final payment, is sharply contested.[7] Entertaining this appeal would have embroiled the Third Circuit unnecessarily in interlocutory consideration of legal issues which typically arise repeatedly in commercial cases.

3. The only other consideration on which Petitioner relied to support Rule 54(b) certification is that statutory interest rates are below current market rates. If that sufficed, virtually *every* interlocutory order sustaining a monetary claim would be immediately appealable. The inconsistency of such a sweeping proposition with the purposes of Rule 54(b) and the policy against piecemeal appeals is manifest and further review of it is unwarranted.

Nor does the decision below conflict, in this regard, with *United Bank of Pueblo* v. *Hartford Accident & Indemnity Co.,* 529 F.2d 490 (10th Cir. 1976), as Petitioner asserts (Pet. 9). The Tenth Circuit there identified the loss of interest as one of numerous factors supporting a Rule 54(b) certification under the facts of that case. It did not hold—as would be required to accept Curtiss-Wright's position—that any loss of interest is a self-sufficient ground for certification. The case is readily distinguishable in other respects: all

[7] GE considers the District Court's ruling on the merits to be entirely incorrect. Many New York cases strictly enforce "condition precedent" clauses in similar circumstances. *E.g., Coulter* v. *Board of Education,* 63 N.Y. 365, 368-369 (1875); *R. J. Marshall, Inc.* v. *Turner Construction Co.,* 139 N.Y.S.2d 55, 58 (Sup. Ct. 1955); *Witherell* v. *Lasky,* 286 App.Div. 533, 535, 145 N.Y.S. 2d 624, 626 (1955). *See also Brandt Corp.* v. *City of New York,* 14 N.Y.2d 217, 219-220, 250 N.Y.S.2d 407, 409, 199 N.E.2d 493, 494-495 (1964). The single case relied upon by the District Court as supporting a contrary result simply did not involve a "condition precedent" clause at all.

claims between the two contending parties had been fully and finally adjudicated; the party in whose favor certification was granted did not face remaining counterclaims, and there was no prospect of payment of substantial sums to it followed by a later obligation of repayment, much less of an interlocutory outflow of public monies. Only an unrelated cross-claim, which could not affect the plaintiff's right to recovery, or the amount of its recovery, remained. 529 F.2d at 492-493.

4. Curtiss-Wright is incorrect in characterizing the Third Circuit's decision as one "that any pending counterclaim bars Rule 54(b) certification" (Pet. 11) or as incorporating "a hard and fast rule that economic loss, no matter how severe, can never constitute a justification for certification" (Pet. 9). On its factual presentations, the case does not raise any such broad questions. The Third Circuit merely rejected Curtiss-Wright's equally extreme position that no specific showing of harshness beyond some limitation in the rate of interest is required. The Third Circuit did not misconceive any specific legal requirements, or misapply the pertinent "infrequent harsh case" test to the facts. No question of general importance concerning Rule 54(b) is presented; rather Curtiss-Wright's Petition merely asserts its parochial interests upon this unique record.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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